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Will the Real Paul Robinson Please Stand Up? Robinson's Conflicting Criminal Code

Kimberly Kessler Ferzan*

Paul Robinson is widely regarded as one of the world's leading criminal law theorists. Moreover, Robinson does not spend all of his time in ivory towers; he drafts criminal codes.¹ Thus, Robinson's world-view matters to the on-the-ground application of criminal law.

Although Robinson famously advocates for a wide range of criminal law distinctions and doctrines, two of the most important aspects of his theory are (1) his reliance on the difference between conduct and adjudication rules, and (2) the distinction he draws between "deeds" and "reasons" views of justification. Robinson takes seriously that some parts of criminal codes are directed toward citizens as to how to behave, but other rules are meant to guide judges and jurors. And, he maintains that because justifications are conduct rules for citizens, they must be guided by the "deeds" theory of justification, because the "reasons" theory conflates the purpose of rules of conduct with the reasons for having principles of adjudication.

Here is Robinson's structure. Rules of conduct are the rules for citizens.² They include the acts that are forbidden and the acts that are justified.³ Principles of adjudication are rules for judges and juries.⁴ They include culpability principles.⁵ "Don't hit" is a rule of conduct. "It is worse for the defendant to hit purposefully" is a principle of adjudication and grading. "You may hit if you are being attacked" is a rule of conduct. "The defendant may be excused if he thought he was under attack but was not" is a rule of adjudication.

As for deeds versus reasons, because justifications, such as self-defense and necessity, tell citizens what they may do, Robinson argues that justifications are determined solely by the objective facts (the "deeds" theory).⁶ Robinson maintains

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¹ See *Curriculum Vitae of Paul H. Robinson*, UNIV. OF PA. LAW SCH., (APR. 23, 2012) <http://www.law.upenn.edu/cf/faculty/phrobins/cv.pdf>.

² Paul H. Robinson, *Four Distinctions That Glanville Williams Did Not Make: The Practical Benefits of Examining the Interrelation Among Criminal Law Doctrines* 10 (Univ. of Pa. Law Sch., Pub. Law Research Paper No. 12-03, 2012), available at <http://ssrn.com/abstract=1987762>.

³ *Id.*

⁴ *Id.* at 11.

⁵ *Id.* at 10.

⁶ PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 96 (1997).

that an act is justified when “there is no *net* societal harm.”⁷ “Reasons” theory, which looks to what the defendant (reasonably) believed, is misguided according to Robinson because the defendant’s beliefs do not determine what the defendant should do.⁸ The facts determine that. Rather, the defendant’s beliefs, when wrong, may still excuse him and are thus part of the principles of adjudication.⁹ In other words, people should act only when they are, in fact justified, but not when they mistakenly believe (even reasonably) that they are justified.

Robinson argues that his structure provides a coherent and clear criminal law while the reasons theory does not. For example, he claims that “the objective deeds approach is a dramatically more useful and clarifying conceptualization than the subjective reasons approach.”¹⁰ However, Robinson fails to see that his very own theories about risking and about self-defense incorporate the perspective of reasons theories. And the combination of deeds and reasons that Robinson unwittingly advocates leads to profound inconsistencies.

Before setting forth the contradictions within his code, a brief interlude on epistemic perspectives is necessary.¹¹ Following Derek Parfit, Victor Tadros has recently argued that what is wrong, permissible, justified or required can be “epistemically relativized.”¹² That is, we can make any of these moral judgments from three perspectives: the facts themselves, the defendant’s beliefs, or the evidence available to the defendant.¹³ Imagine Alice speeds 100 m.p.h. through an intersection; we will say that this conduct is “risky.” However, from an omniscient perspective—the perspective of the facts—it may be clear that Alice will not hit anyone. Alice, from the perspective of her own beliefs, will believe the risk that she will hit someone to be at some level of probability. The evidence available to Alice, or a similar standpoint such as an “ideal observer” or “reasonable person,” may have different information than Alice herself and thus lead to a different assessment (perhaps Alice is distracted and does not see an approaching school bus). The probabilities assigned by either Alice or the reasonable person will vary with the information available to that perspective—the speed, the time of day, the crowd, etc., will all influence the assessment of the risk. And, depending upon the probability of harm, Alice or the reasonable person can then assess whether taking

⁷ *Id.* at 95.

⁸ Paul H. Robinson, *Objective Versus Subjective Justification: A Case Study in Function and Form in Constructing a System of Criminal Law Theory*, in CRIMINAL LAW CONVERSATIONS 343, 345–46 (Robinson, Garvey & Ferzan eds., 2009).

⁹ ROBINSON, *supra* note 6, at 118–19.

¹⁰ Robinson, *supra* note 8, at 346.

¹¹ For further discussion of the nature of risk and how it relates to culpability, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 28–29 (2008).

¹² VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 217–18 (2011).

¹³ *Id.* at 218.

the risk is justified. In contrast, from the fact-relative perspective, the harm will simply not occur.

Robinson has laid claim to the fact-relative perspective. Indeed, his arguments about deeds theory's superiority over reasons theory rely on it. Specifically, his claim that a mistaken justification is not a justification, but rather an excuse, turns on the requirement that others should only assist individuals who are justified based on the facts. Imagine Betty believes that Carla is attacking her, but Betty is just reasonably mistaken. According to Robinson, Donald should not aid Betty because she is defending against someone who is not actually attacking her. Because there is no real threat, she is not to be assisted (Donald may not, say, throw her a weapon with which to defend herself), no matter how reasonable her belief is. She may be entitled to an excuse, however, because her belief is reasonable and so we should not blame her if she harms her putative attacker in mistaken self-defense.

Notably, Robinson attributes to reasons theorists a belief-relative perspective.¹⁴ This would mean that reasons theorists think that one is justified whenever one believes the justifying facts exist (e.g., a belief one is being attacked). However, particularly with respect to mistaken justifications, reasons theorists routinely require that that belief be *reasonable*, thereby laying claim to an evidence-relative perspective.¹⁵ This is important because Robinson does not recognize that portions of his code, whereby he abandons a fact-relative analysis for an evidence-relative perspective, actually shift him into reasons territory. This shift in perspective leads to Robinson contradicting himself. Cases with the very same structure have different answers, depending upon whether Robinson has adopted a fact-relative view or an evidence-relative view. Unfortunately for Robinson, these two perspectives cannot peacefully co-exist as the standard for conduct rules within one criminal code.

Consider three cases.

Alex:

Alex is driving with Betty. Suddenly, Betty turns green and begins to vomit in Alex's car. Based on these appearances, Alex believes Betty's

¹⁴ ROBINSON, *supra* note 6, at 101 ("The standard formulation . . . provides . . . 'an actor is justified if he believes . . .'").

¹⁵ It may be that Robinson has drawn too much from his debate with Fletcher as to whether the actor must not only perform the right deed but also perform it for the right reason. However, the permissibility of the action for reasons theorists does not come merely from a belief, but from conformity with some objective standard. After all, Fletcher did not advocate just the "right reason" but also the "right deed." See also Douglas N. Husak, *Justifications and Criminal Liability for Accessories*, 80 J. CRIM. L. & CRIMINOLOGY 491, 508 (1989) (advocating a "best evidence available" standard).

life is in danger, speeds to the hospital, and runs a red light. Unbeknownst to Alex, Betty's just profoundly hungover.

Did Alex behave negligently? According to Robinson, criminal law's rules of conduct do not prohibit Alex's behavior. Robinson views this as an *actus reus* question. This is not about justification; this is not about excuse; this is not a *mens rea* problem. Rather, according to Robinson, Alex has not performed the *actus reus* of a risk creation offense because his conduct did not create a prohibited risk. Specifically, Robinson has argued that criminal codes only define the *mens rea* of reckless and negligent conduct, but they need an *actus reus* of "creating a prohibited risk" as well. He has suggested the following formulation of a prohibited risk: "An actor creates a 'prohibited risk' when he creates a substantial and unjustified risk that a prohibited result will occur. A risk is substantial and unjustified if, given its nature, degree, and circumstances, its creation is a deviation from the standard of care of a reasonable person."¹⁶ He alternatively offers: "A 'prohibited risk' is a risk that is of such a likelihood and of such a harm that the reasonable person would not judge it to be justified by the circumstances."¹⁷ Alex speeds because he mistakenly believes he needs to get Betty to the hospital. This is not a prohibited risk under Robinson's formula. A reasonable person would act as Alex does.

Can Robinson rely just on the speeding itself and not on the reason for speeding? No. Notice that it has to matter why Alex is speeding for Robinson's formulation. Indeed, both of his suggested formulations specifically take into account whether the risk is justified. Moreover, the justification has to be taken from the *ex ante* perspective. Otherwise, whenever someone drives, whenever a construction worker uses dynamite, whenever a baseball player hits a ball that could fly into the stands, they are imposing a prohibited risk. To cabin the prohibition, the justification for the risk must be taken into account—normal driving, building skyscrapers, and playing a popular sport.¹⁸ But once we take the justification for the risk imposition into account, then it seems that Alex cannot be creating a prohibited risk because the risk to life and limb would be deemed justified by a reasonable person in the circumstances. (Again, the reasonable person in the circumstances never knows everything because it is never reasonable to drive if the car will kill someone, never reasonable to use dynamite if it will kill a bystander, and never reasonable to hit a baseball that will fly into the stands and kill a spectator. The omniscient do not see risks and would find all and only those

¹⁶ Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, in 4 THEORETICAL INQUIRIES IN LAW 367, 377 (2003); see also Robinson, *supra* note 2, at 11 ("In the context of rules of conduct, the law must define those *ex ante* risks that are prohibited.").

¹⁷ See Robinson, *supra* note 16, at 378.

¹⁸ See *id.* at 376 (noting that the nature, degree, and justification for the risk and the community's balance of these factors through the reasonable person standard is required).

risks that actually cause harm to be prohibited.) From the perspective of beliefs or evidence, Alex acts permissibly. From the standpoint of facts, he does not. Robinson concludes Alex has not violated the *actus reus* conduct rule.

Darryl:

Carl is attacking Darryl. Just as Carl lifts up a knife to throw at Darryl, Darryl shoots Carl with a gun.

Now, assume that we want to question whether Darryl is justified. Let us assume that we can know that Carl would have changed his mind (perhaps Carl has changed his mind in the past, we have a diary, and so forth). According to Robinson, despite the chance that the aggressor may renounce, self-defense is justified. One is justified to act in self-defense when the attack is immediately necessary, and one need not wait until the attack is imminent. In considering the imminence requirement, Robinson opines:

Such a view is not entirely inappropriate since it gives *A* the opportunity to change his mind about killing *D*, and it thereby avoids the loss of either life. But one may disagree as to whether it is appropriate to give the opportunity to *A* at *D*'s expense, by forcing *D* to risk the chance that *A* will decide to kill him a day earlier.¹⁹

Here, Robinson allows *D* to act despite the fact that it may ultimately be unnecessary. In the context of a justification defense, Robinson considers whether it is unfair to force *D* to bear the risk of error in determining whether *D* has a justification defense and concludes that it is unfair to ask *D* to wait for certainty.

Recall that Robinson tells us that an act is justified when there is no net social harm. With respect to self-defense, the necessity limitation exists so that one does not kill aggressors, even culpable ones, if one does not have to. One role of imminence, or the immediately necessary rule advocated by Robinson above, is to serve as a "proxy" for necessity. We only want defenders to kill when it is necessary and thus require them to wait until the last possible minute.

Notice then that what imminence is about is risk. We require the defender to wait because there is some chance the aggressor will not go through with the attack. However, even at the point of immediate necessity, it may nevertheless be true that the aggressor would not have gone through with the attack. Here, because Carl was not going to go through with the attack, Darryl did cause a net social harm as he killed an aggressor whom it was unnecessary to kill. Darryl is belief and evidence-relative justified, but fact-relative unjustified. In this case, Robinson concludes that Darryl is justified and he allows Darryl to act based on reasonable appearances.

¹⁹ PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES 79 (1984).

Ellen:

Ellen is taking her nightly jog. Out of nowhere, Fred runs up behind her and grabs her arm. Fearing that this person may be just about to attack her, Ellen stabs Fred. As it turns out, Fred was trying to catch up to Ellen to give her the keys she had dropped.

What result here? Robinson says that Ellen has made a mistake as to justification. She is excused, but she has not done the right thing.²⁰ Notice again, that Ellen is belief and evidence-relative justified, but she is fact-relative unjustified. Robinson concludes that Ellen is not justified, based on the facts.

The problem for Robinson is that all three cases have exactly the same structure. Alex incorrectly believes Betty is sick; Darryl incorrectly believes that Carl will kill him; and Ellen incorrectly believes that Fred is about to attack her. None of them create a net social benefit—no speeding is authorized for hangovers, no killing is authorized when unnecessary, and no killings are authorized for false beliefs about good Samaritans. But, in each case, the person acts as a reasonable person would.²¹ Yet, in cases one and two, Robinson privileges the reasonableness of the belief in allowing Alex to run red lights and Darryl to respond to immediate threats, but he denies that reasonable beliefs serve any *ex ante* conduct rule function for Ellen. The problem is that Robinson does not see that the evidence-relative perspective is precisely the territory that reasons theorists claim when they say that Ellen's reasonable belief—that is, the belief from an objective, evidence-relative perspective—allows her to act. If Robinson is going to allow risks to matter, thereby denying that Alex has committed the *actus reus* and that Darryl has made a wrong prediction, then he must also allow Ellen to act based on risks she perceives. Either “reasonable and wrong” can exist within a conduct rule or it cannot. But Robinson must choose whether he is truly a deeds theorist, or a reasons theorist in disguise.

²⁰ ROBINSON, *supra* note 6, at 100–01 (jogger-mistaken-for-attacker is example of mistaken reasonable belief which functions as an excuse).

²¹ I am leaving aside my own skepticism about negligence. See ALEXANDER & FERZAN, *supra* note 11, ch. 3. This is an internal critique of Robinson's position.